

Federalism and Viable State Government — The History of Utah's Constitution

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I. INTRODUCTION

The decade of the 1960's has witnessed, thus far, a sharp upswing of interest in the state of the states. Financial crisis, political paralysis, reapportionment, and the continued trend of federal intervention in heretofore "local" affairs have forced believers in the federal idea to reexamine the status of state government. Efforts have been made in learned¹ and popular journals² to explain the reasons for the decline of state government and the continued growth of federal power. Concern with the condition of state government in Utah has been evidenced by the passage of a joint resolution by the Thirty-sixth Legislature submitting the question of the need for a constitutional convention to the voters³ and by legislative action initiating studies of the executive,⁴ legislative,⁵ and judicial⁶ branches of Utah state government. Concern with the status of Utah's government has wisely turned to the fundamental document creating that government, the Utah Constitution of 1896.

To be sure, the decline of state government has not been caused solely by deficiencies in the governmental structure created by state constitutions. But it will be the purpose of this Symposium to examine the contribution the Utah constitution has made to the decline of state government and the consequent inevitable increase of federal intervention into the void left by constitutionally unable state government.

Two factors, however, must be evaluated with the individual studies in this Symposium. The first is to place in perspective the role state constitutions have played in the larger panorama of American federalism. The second is to place Utah's constitution in its historical perspective, to better understand why Utah adopted a basic framework of government designed to prevent government from governing.

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¹ See, e.g., Barnhart, *A New Constitution for Arkansas?*, 17 ARK. L. REV. 1 (1963); Dionisopoulos, *Indiana, 1851, Alaska, 1956: A Century of Difference in State Constitutions*, 34 IND. L.J. 34 (1958); Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics*, 42 CORN. L.Q. 329 (1957); Flynn, *The Crisis of Federalism: Who is Responsible?*, 51 A.B.A.J. 229 (1965); Karsh, *A Missouri Constitutional Convention in 1963*, 25 MO. L. REV. 50 (1960); Pope, *Tennessee's Octogenarian Constitution*, 22 TENN. L. REV. 346 (1952); Schnader, *Dead Wood in the Pennsylvania Constitution*, 25 TEMP. L.Q. 399 (1952); *Symposium — Nebraska Constitutional Revision*, 40 NEB. L. REV. 559 (1961).

² Armbrister, *The Octopus in the State House*, The Saturday Evening Post, Feb. 12, 1966, p. 25; Brown, *How to Put the States Back in Business*, Harpers, Sept. 1964, p. 98; Tydings, *The Last Chance for the States*, Harpers, March 1966, p. 71.

³ Utah Laws 1965, S.J. Res. 3, at 695.

⁴ Utah Laws 1965, ch. 138, at 387.

⁵ Utah Laws 1st Spec. Sess. 1966, ch. 6, at 4.

⁶ Utah Laws 1st Spec. Sess. 1966, ch. 7, at 6.

II. FEDERALISM AND THE DECLINE OF STATE GOVERNMENT

Many scholars have pinpointed the constitutional revolution which occurred between the Great Depression and the Second World War as the epoch of a new era in American federalism.⁷ The era of "dual federalism" yielded to the crushing demands of industrialization, urbanization, social and cultural integration and the emergence of the United States as a world power in diplomatic, military, and economic affairs. The relationship of the federal and state governments shifted from that of independent and distinct "sovereigns," with theoretically separate and distinct spheres of power, to a relationship of partners in the process of government — to a form of federalism called "cooperative federalism."⁸

But the passage of time has revealed weaknesses in the articles of partnership and the imposition of new pressures upon the state-federal relationship. "Hot" and "cold" wars have necessitated vast expansions in national activity and have created a consequent demand for the necessary funds to finance America's emergence as a world power. But federal, state, and local governments must generally rely upon the same economic base for their income, and as the national government's revenue needs have grown, the national government's utilization of the tax base has expanded horizontally and vertically. State sources of tax revenue, despite an expanded state economy, have been subject to increasing competition from federal demands, thereby placing stress upon the balance of cooperative federalism's articles of partnership.

The social and political impact of the expenditure of a massive national budget has placed additional strain upon the partnership. The economic and hence political importance of elected national representatives has increased immeasurably vis-à-vis their state counterparts in the eyes of constituents, since the political prowess, ability, and judgment of elected national representatives have an impact which can be reflected in a geographic region's economic future and in an individual's paycheck. Consequently, the political importance and "visability" of elective representatives to the national government have outpaced and overshadowed that of elective representatives to state governments.

Internal national factors have also placed stress upon the articles of partnership of cooperative federalism. The growth of national business enterprises and labor organizations, unbounded by the artificial political boundaries of a state or the limits of natural geographic regions, have necessitated the existence of national controls, and on occasion, the existence of exclusive national controls. The economic interdependence of heretofore independent and self-sustaining political and geographic regions, as well as the realization that the economic misfortune of those living in one area of the country has a direct impact upon the economic well being of those living in

⁷ CLARK, *THE RISE OF A NEW FEDERALISM — FEDERAL STATE CO-OPERATION IN THE UNITED STATES* (1938); McCLOSKEY, *THE AMERICAN SUPREME COURT* 136-80 (1960).

⁸ See Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

a different political or geographic area, have necessitated affirmative national action to maintain the balance wheel of the national economy. In fact, the development of a national economy and the realization of its existence have placed additional strain upon the articles of partnership of cooperative federalism, since acknowledgment of the existence of a national economy has necessitated central regulation over that economy.

The accelerated urbanization of the nation has made the artificial political boundaries of the states, drawn over a century ago, impediments to the exercise of affirmative state action. While the use of rivers and other natural geographic phenomena as political boundaries may have been of utilitarian value 100 years ago, the natural growth of urban and industrialized areas along these waterways and the expansion of population and metropolitan economic boundaries from shore to shore and across state lines often makes politically local issues interstate in constitutional character. Other states, with geographic boundaries that resemble a legislature's best efforts at gerrymandering, have little internal cohesion culturally, economically, or politically since their boundaries were determined by historical accident rather than a rational evaluation of the factors which make a particular geographic area a viable political entity. Common political and economic problems demand political entities with jurisdiction coextensive with the tax base and political process necessary to solve the problem. It is an unfortunate reality that growth beyond artificial political boundaries has deprived many state and local governments of jurisdiction over the tax base and human resources necessary to solve many of the problems created by natural growth, thereby further necessitating regional or national action.

But weaknesses in the articles of partnership of cooperative federalism are not solely attributable to international events, national economic integration, urbanization, and irrational political boundaries. The state's side of the partnership has been inherently weak because of two crippling internal difficulties — malapportionment and debilitating state constitutions.

The malapportionment difficulty, presently being remedied by federal and state judicial intervention, rendered many state governments unwilling to participate in the partnership of cooperative federalism. The lack of performance by state legislatures in important areas of concern to the majority of state citizens, has caused an accretion to federal power since national representatives have responded to the problems of constituents denied adequate representation in state government. On occasion, malapportionment has resulted in outright refusals by state governments to act on the problems of underrepresented areas. One need only survey the domestic legislative programs of the last four presidents to identify several areas of traditional state concern which have been defaulted to federal action and control because of unrepresentative and, therefore, unresponsive state legislatures.⁹

⁹ See *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 35-62 (1965) (Statement of the Hon. Paul Douglas) ; Tydings, *supra* note 2.

But even with the elimination of the inherent disabilities caused by mal-apportionment, the state government side of the cooperative federalism partnership suffers under the crippling effect of archaic state constitutions — constitutions which render state governments incompetent to participate as strong and vital partners in the evolving system of federalism in the United States.¹⁰

The majority of present state constitutions were drafted in the latter half of the 19th century, an era of popular mistrust and hostility toward government. The people's mistrust of government is readily apparent on the face of many state constitutions. Utah's constitution, drafted in 1895, is representative of the era, particularly in light of the fact that most sections of the Utah constitution were copied from several other state constitutions drafted in the latter part of this period. But Utah's constitutional history and the explanation for Utah's outmoded and archaic constitution differs somewhat from the history and experience of her sister states. Furthermore, a Symposium on Utah's constitution must be weighed in light of Utah's unusual history and experience with the statehood process and with the process of drafting a fundamental charter of government.

III. UTAH'S CONSTITUTIONS AND THE CONSTITUTION OF 1896

No other territory experienced the difficulties that Utah encountered in obtaining statehood, for no other territory was settled under such unusual circumstances.¹¹ The territory was settled by members of a cohesive and unusual religious group founded in the early 19th century — the Church of Jesus Christ of Latter-day Saints, commonly called "Mormons."

The Mormon settlers of Utah were refugees of religious persecutions in Illinois and Missouri. Those persecutions, founded in part upon mistrust of the theocratic structure of early Mormon settlements, fear of the secular political impact of tightly organized Mormon communities, jealousy of the economic success of the Mormons, and prejudice toward the unusual features of Mormon religious beliefs and practices, ultimately caused one of the largest mass migrations in the history of America.¹² After the murder of Joseph

¹⁰ See Flynn, *supra* note 1, at 231.

¹¹ See CREER, *UTAH AND THE NATION* (1929); Hickman, *Utah Constitutional Law*, 1954, at 40-78 (unpublished thesis in University of Utah Library); Morgan, *The State of Deseret*, 8 *UTAH HISTORICAL Q.* 67 (1940). For other general surveys of Utah's territorial history see BANCROFT, *HISTORY OF UTAH* (1889); CREER, *FOUNDING OF AN EMPIRE* (1947); NEFF, *HISTORY OF UTAH* (1940); WHITNEY, *HISTORY OF UTAH* (1893).

¹² See CREER, *UTAH AND THE NATION* 31-56 (1929). See generally O'DEA, *THE MORMONS* (1957); 1 *ON THE MORMON FRONTIER — THE DIARY OF HOSEA STOUT* (Brooks ed. 1964). Volume 1 of Stout's diary recounts the events which caused the migration and the migration itself.

An event which touched off persecution of the Mormons in Illinois and a direct cause of the murder of Joseph Smith was the suppression of the *Nauvoo Expositor*. The paper was established by a group of dissident members of the Mormon community of Nauvoo, Illinois, and criticized Church leaders for practicing polygyny. The city council of Nauvoo ordered the destruction of the paper, thereby placing in motion the events leading to the expulsion of the Mormons from Illinois and their subsequent migration to the West. See Oaks, *The Suppression of the Nauvoo Expositor*, 9 *UTAH L. REV.* 862 (1965).

Smith, the founder and first President of the Church of Jesus Christ of Latter-day Saints, Brigham Young led the church members to the west to find and settle the land of "Zion." On July 24, 1847, President Young led the first party of settlers into the valley of the Great Salt Lake. Within four days initial plans were made for the founding of a city, supply of life's immediate necessities and the distribution of land.¹³ The organization and institutions of the Church provided a ready form of civil government to regulate civil affairs in the new city.¹⁴

Ecclesiastical government served as the civil government of the settlement until the adoption of the constitution of the State of Deseret on March 10, 1849.¹⁵ Utah's first constitution, the first of seven, claimed territory extending from Oregon and Idaho on the north to the Gulf of California on the south, and from the Sierra Nevada on the west to the eastern plateau of the Rockies on the east. The text of the constitution is noteworthy to the student of state constitutions in this day and age, since it was brief and concise and was concerned only with establishing a fundamental framework of government. In many respects the constitution of 1849 was similar to the Illinois Constitution of 1818,¹⁶ the constitution the Mormons had lived under in Nauvoo, Illinois. A bicameral legislature was established,¹⁷ executive power was vested in a popularly elected governor and a lieutenant governor,¹⁸ and judicial power was vested in a "Supreme Court, and such Inferior Courts, as the General Assembly shall from time to time establish."¹⁹

A delegate to Congress was appointed with directions to present a petition for statehood or territorial status along with a copy of the 1849 constitution of the State of Deseret.²⁰ Senator Stephen A. Douglas of Illinois introduced the petition and constitution²¹ which were sent to what was to become the

¹³ GREER, UTAH AND THE NATION 58 (1929).

¹⁴ Church organization provided executive, legislative, and judicial authority. Since the first settlements did not include non-Mormons, it was not unusual for Church institutions to serve the functions of civil government. Upon creation of the territory in 1850, separation of secular and religious authority existed in theory rather than in fact. Brigham Young was appointed governor and the people continued to rely upon Church institutions, particularly ecclesiastical courts, for the functions of civil government. *Id.* at 59-63. The existence of a theocracy proved to be a major objection to Utah's statehood for forty years. Morgan, *supra* note 11, at 70.

¹⁵ The Constitution of Deseret of 1849 is reprinted in ACTS, RESOLUTIONS AND MEMORIALS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH 44-56 (1855). It may also be found in Morgan, *supra* note 11, at 156-63.

¹⁶ Hickman, *op. cit.* *supra* note 11, at 42.

¹⁷ Constitution of the State of Deseret, art. II (1849). The various proposed constitutions, which never acquired the status of positive law, are cited by the name under which they were submitted to Congress. The particular draft cited is indicated by the date in the parenthetical.

¹⁸ *Id.* art. III. One of the first acts passed by the general assembly, An Ordinance Regulating Elections, called for the election of the secretary of state, treasurer, and auditor of public accounts, as well as the governor and lieutenant governor. The ordinance is reprinted in Morgan, *supra* note 11, at 163. Article V, § 1, of the 1849 constitution provided for election of the secretary of state, treasurer, and auditor of accounts. Article III, § 1, vested executive power in the office of governor. It is not clear what functions the officers elected under article V, § 1, were to serve.

¹⁹ *Id.* art. IV.

²⁰ GREER, UTAH AND THE NATION 76 (1929).

²¹ CONG. GLOBE, 31st Cong., 1st Sess. 86 (1849).

traditional burial ground for Utah petitions for statehood, the Committee on the Territories.²² Although Utah's first petition for admission to the Union was opposed by dissident Mormons²³ and anti-Mormons of Iowa and Illinois,²⁴ the petition foundered upon the larger issue of slavery. As a part of the political compromise of 1850 admitting California into the Union as a "free state," Utah and New Mexico were given territorial status and were denied statehood.²⁵

Subsequent efforts to obtain statehood, however, stumbled upon a deeper issue — the practice of polygyny by members of the Mormon Church, first announced publicly in 1852.²⁶ Utah's second constitution, drafted in 1856 and closely patterned upon the constitution of 1849,²⁷ was not even presented to Congress by Utah's delegate due to the hostile atmosphere generated by the practice of polygyny and the unsettled political temper of the times caused by the slavery controversy.²⁸ The national reaction against the practice of polygyny, and general hostility toward the Mormon religion, gradually replaced slavery as the principle stumbling blocks to subsequent attempts to obtain statehood for Utah.

Utah's third constitution was drafted in convention and adopted on March 23, 1862. The constitution of 1862 and a memorial were introduced in Congress by Doctor Bernhisel, Utah's delegate, on June 9, 1862.²⁹ The memorial demanded statehood for "Deseret," claiming Congress had no power to deny "Deseret" admission to the Union. Utah's plea of 1862 was not a humble supplication, but was a demand by the people of Utah "to be admitted into the federal Union . . . under the title of State of Deseret; feeling assured that when . . . [we] ask for bread from the granaries of freedom you will not give . . . [us] a stone quarried from the crumbling ruins of colonial despotism."³⁰

The constitution of 1862 differed only in organization, and inconsequential particulars from the documents of 1849 and 1856. But the form of government proposed by Utah's constitution had little effect upon a Congress concerned with preserving the Federal Union. The Civil War and the

²² *Id.* at 213.

²³ A petition attacking the Mormon settlers of Utah by William Smith and Isaac Skeen, representing themselves as the legitimate presidents of the Church of Jesus Christ of Latter-day Saints, was introduced by Mr. Underwood of Kentucky. *Id.* at 92.

²⁴ *Id.* at 413, 524.

²⁵ The Compromise of 1850 was passed as an omnibus bill on September 7, 1850, *id.* at 1776, and was signed into law by President Fillmore on the same day. *Id.* at 1784. For an analysis of the Compromise as it affected Utah see CREER, *UTAH AND THE NATION* 82-87 (1929).

²⁶ Linford, *The Mormons and the Law: The Polygamy Cases*, 9 *UTAH L. REV.* 308, 309 (1964).

²⁷ The text of the constitution of 1856 may be found in the *Deseret News*, April 2, 1856, p. 39, cols. 1-3.

²⁸ CREER, *UTAH AND THE NATION* 112 (1929). Hickman quotes the Republican Party Platform of 1856 as condemning the "twin relics of barbarism; slavery and polygamy." Hickman, *op. cit. supra* note 11, at 45.

²⁹ *CONG. GLOBE*, 37th Cong., 2d Sess. 2620 (1861). The memorial and the constitution of 1862 were printed as H.R. Misc. Doc. No. 78, 37th Cong., 2d Sess. (1862).

³⁰ *Id.* at 3.

practice of polygyny doomed Utah's third bid for statehood and the constitution of 1862 died in the House Committee on the Territories.³¹

The fourth constitution of Utah was adopted by a constitutional convention on March 2, 1872, and was approved by the people on March 18, 1872.³² The constitution of 1872 marked the first serious change from the 1849 model. The so-called "Ghost Government of Deseret"³³ was ended. For the first time the convention seriously considered changing the name of the proposed state from Deseret to Utah and the convention delegates resolved to look elsewhere for a model to follow in drafting a constitution. Since the constitution of Deseret "had . . . [an] odor of defeat about it,"³⁴ the constitution adopted by Nevada upon admission to the Union in 1864 was chosen as a model since it had recently passed muster with Congress. For the first time, an ordinance, irrevocable "without the consent of the United States" and the people of the State of Deseret was inserted in the constitution;³⁵ the separation of powers doctrine was expanded in constitutional language,³⁶ almost to its present state of rigidity;³⁷ and, limitations upon the legislature such as the "door of each house shall be kept open during its session,"³⁸ the one subject rule,³⁹ the special law limitation,⁴⁰ the enacting clause limitation,⁴¹ and the sixty-day time limitation⁴² made their first appearance in a Utah constitution. The executive branch was severely weakened by requiring popular election of numerous officers of the executive branch⁴³ and by creating a board of examiners composed of the governor, secretary of state, and attorney general with exclusive power to "examine all claims against the State."⁴⁴ The judicial article was expanded from five

³¹ Hickman, *op. cit. supra* note 11, at 46; Morgan, *supra* note 11, at 136, 139.

³² The text of the constitution of 1872 is printed in H.R. Misc. Doc. No. 165, 42d Cong., 2d Sess. 5 (1872).

³³ For a description of the "Ghost Government of Deseret" see Morgan, *supra* note 11, at 132-50.

³⁴ *Id.* at 150.

³⁵ The ordinance is now found in an expanded form in article III of the Utah constitution.

³⁶ Constitution of the State of Deseret, art. III, § 1 (1872).

³⁷ UTAH CONST. art. V, § 1.

³⁸ Constitution of the State of Deseret, art. IV, § 14 (1872).

³⁹ *Id.* § 16. This provision is now found in UTAH CONST. art. VI, § 23.

⁴⁰ Constitution of the State of Deseret, art. IV, § 19 (1872). This provision is now found in UTAH CONST. art. VI, § 26.

⁴¹ Constitution of the State of Deseret, art. IV, § 20 (1872). This provision is now found in UTAH CONST. art. VI, § 22.

⁴² Constitution of the State of Deseret, art. IV, § 22 (1872). This provision is now found in UTAH CONST. art. VI, § 16.

⁴³ Constitution of the State of Deseret, art. V, §§ 13, 14 (1872). Section 13 provided for the election of a lieutenant governor and § 14 provided for the election of the secretary of state, treasurer, auditor, surveyor general, superintendent of public instruction, and the attorney general. The Constitution of the State of Deseret of 1862 provided for the popular election of the governor and lieutenant governor in article V, § 1, and legislative election of the secretary of state, treasurer, auditor, and attorney general in article V, § 15.

⁴⁴ Constitution of the State of Deseret, art. V, § 18 (1872). This section was copied verbatim from article V, § 21, of the Nevada constitution; it was later carried over into our present constitution. See UTAH CONST. art. VII, § 13.

short sections in the constitution of 1862⁴⁵ to fifteen sections in the constitution of 1872;⁴⁶ and, limitations upon local government,⁴⁷ taxation,⁴⁸ debt,⁴⁹ and education⁵⁰ found their way into a Utah constitution for the first time. In short, the constitution of 1872 marked a radical departure from previous efforts of drafting a constitution for Utah. It is an important document in Utah's constitutional history since it marks a turning away from the short and simple constitutions drafted by states in the previous century and a following of the long, complicated, and debilitating constitutions adopted by many states in the latter part of the 19th century.

Despite this fundamental change in the framework of Utah's proposed government, the memorial and constitution of 1872 were sent to and died in the House Committee on the Territories.⁵¹ Utah's delegate in the House of Representatives attempted to circumvent the Committee on the Territories by attaching an amendment granting statehood to Utah to a bill granting statehood to Colorado.⁵² An amendment was proposed to the Utah delegate's amendment by Representative Sargent of California, barring statehood until "bigamy, polygamy or plural marriage" was eliminated from the territory.⁵³ The Utah delegate attempted to withdraw the amendment to Colorado's application for statehood, since it was clear that the House would not sustain the amendment "save upon the conditions named . . . [by] the gentleman from California"⁵⁴ Unanimous consent to withdraw the amendment was not given and Representative Clagett of Montana used the occasion to launch an attack upon the Mormon Church, the "theocratic despotism" allegedly existing in Utah and the Mormon practice of polygyny.⁵⁵ Representative Clagett's attack doomed the amendment and set the tone of Congressional attitudes toward Utah for two decades. The issue of Utah statehood was no longer confused with the larger issues of slavery and civil war, but became centered upon Mormon religious beliefs, the practice of polygyny and the dangers of a theocracy existing in the state.⁵⁶

⁴⁵ Constitution of the State of Deseret, art. VI (1862).

⁴⁶ Constitution of the State of Deseret, art. VI (1872).

⁴⁷ *Id.* art. VIII.

⁴⁸ *Id.* art. X.

⁴⁹ *Id.* art. IX.

⁵⁰ *Id.* art. XI.

⁵¹ See CONG. GLOBE, 42d Cong., 2d Sess. 2101 (1872).

⁵² CONG. GLOBE, 42d Cong., 3d Sess. 446 (1873).

⁵³ See *ibid.*

⁵⁴ *Id.* at 919.

⁵⁵ *Id.* at 920. Representative Clagett's remarks were answered by Delegate Hooper of Utah the following day. *Id.* at 945-48.

⁵⁶ The bitterness of the debate and opposition to the Mormon Church at the time is best illustrated by the peroration of Representative Clagett's speech during the debate of January 29, 1873:

I have studiously avoided . . . saying anything upon what is called the religious phase of this Mormon question. . . . As I am . . . dragged into its consideration, I will merely say that the plea of religion is no reason why this matter should not be investigated, nor why the ordinary laws which regulate and protect the rights of person, property, liberty, and reputation in all civilized countries . . . should not be put into exercise in Utah. An institution which profanely claims to rule by divine right; which by affirmative laws concocted with deliberate cunning,

Nevertheless, a fifth attempt to gain statehood was made in 1882, the year which saw the passage of the Edmunds Act designed to stamp out "polygamy" in the Utah Territory.⁵⁷ The constitution of 1882⁵⁸ marked a formal change in the name of the proposed state from "Deseret" to "Utah" since "Congress . . . refused us that name."⁵⁹ But aside from total revision of the article on education,⁶⁰ omission of the ordinance, and minor changes in other sections, the constitution of 1882 was almost an exact copy of the constitution of 1872. The 1882 constitution was ratified by the people of Utah on May 22, 1882, by a vote of 27,814 to 498⁶¹ and was introduced in the House on June 23, 1882.⁶² Like its predecessors, the constitution of 1882 died in the House Committee on the Territories.

The year 1887 again saw contemporaneous action by Congress on polygyny and by Utah on statehood. Congress passed the Edmunds-Tucker Act on March 3, 1887,⁶³ which was designed to eradicate polygyny and destroy Mormon political power by criminally punishing "polygamy," substituting federal officials for territorial law enforcement officials, disinheriting illegitimate children, regulating local elections, disenfranchising polygynist males, dissolving the corporation of the Church of Jesus Christ of Latter-day Saints, and — in effect — forfeiting the property of the Church to the United States.⁶⁴ Three months later the "Peoples Party," the political party most Mormons belonged to, called upon the Democratic, Republican, and "Liberal" parties to nominate candidates for a constitutional convention scheduled for June 30, 1887, in Salt Lake City. The Democratic, Republican,

denies to us all those privileges which we have been taught to believe are our most precious birthright as American citizens; which forcibly expels us from the public domain; which pries into the secrets of the fireside; which enforces its decrees by assassination; which tears the crown jewel from the diadem of woman's purity, and takes from her the holy bond which honors her in all nations of the earth; which has elevated lechery to the dignity of a religious dogma, and burns incense upon the altars of an unhallowed lust; and above all, and as a crime against the future, which ages of forgiveness cannot condone nor the waters of ocean [*sic*] wash out, which yearly writes in letters that blister as they fall the word "bastard" across the branded brows of an army of little children — such an institution is not entitled to any right, either human or divine, to hide the hideous deformity of its nakedness with the mantle of religion nor seek shelter under the protective aegis of the civil law.

Id. at 948.

The Mormon practice of polygyny was based upon theological conviction. For an analysis of the basis of that conviction see Linford, *supra* note 26, at 308–10. Federal legislation punishing the practice of "polygamy" in the territories and invalidating the Utah territorial legislation incorporating the Church of Jesus Christ of Latter-day Saints had been in effect since 1862. Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501. The act of 1862 was a "dead letter." Linford, *supra* at 316. The Edmunds Act, ch. 47, 22 Stat. 30 (1882), established stronger enforcement methods and jeopardized the entire structure of the Mormon Church.

⁵⁷ The Edmunds Act, ch. 47, 22 Stat. 30 (1882).

⁵⁸ Utah's proposed constitution of 1882 is reprinted in H.R. Misc. Doc. No. 43, 47th Cong., 1st Sess. (1882).

⁵⁹ The Deseret Evening News, April 26, 1882, p. 3, col. 2.

⁶⁰ Constitution of the State of Utah, art. XI (1882).

⁶¹ See H.R. Misc. Doc. No. 43, 47th Cong., 1st Sess. 2 (1882).

⁶² 13 CONG. REC. 5282 (1882).

⁶³ Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887).

⁶⁴ For an analysis of the Edmunds-Tucker Act see Linford, *supra* note 26, at 322–27.

and Liberal parties refused to participate, but the Peoples Party elected candidates and the convention met from June 30, 1887, until July 7, 1887.⁶⁵ The convention used the 1882 constitution as a model, and the constitution of 1887 is almost an exact copy of the constitution of 1882. A provision was added to the bill of rights requiring "uniform operation of general laws."⁶⁶ An amendment to the article on elections disenfranchised women and limited suffrage to "male citizens."⁶⁷ A proviso was added to the veto power giving the governor an item veto in appropriation bills;⁶⁸ further debt limitations were added;⁶⁹ and a self-operating ban upon "polygamy and bigamy" was added to the constitution, declaring "polygamy and bigamy" to be contrary to a "republican form of government" and punishable by a fine of not more than 1,000 dollars and a jail sentence of six months to three years.⁷⁰ The inclusion of a criminal law punishing "polygamy" in the constitution of 1887 was a reflection of a change in the Mormon position on polygyny. Pressed hard by criminal prosecutions of polygynists and confiscation of Church property under the Edmunds-Tucker Act, the practice of polygyny was halted by stopping plural marriages in the Temple, although belief in the doctrine was maintained.⁷¹

But the Congress which passed the Edmunds-Tucker Act was obviously not sympathetic to Utah's plea for statehood and the constitution of 1887. The House referred Utah's petition to the Committee on the Territories, there to join its predecessors.⁷² The bill introduced in the Senate for Utah statehood was referred to the Senate Committee on the Territories,⁷³ which submitted a resolution thirteen days later asking to be discharged of its duty to consider the bill. The committee had before it a petition signed by 104,000 citizens from thirty-three states asking Congress not to "allow Utah to become a State so long as the local civil power of the Territory remains in the hands of the Mormon priesthood, and the people evade or refuse obedience to the present laws of Congress against polygamy."⁷⁴ The Senate Committee on the Territories submitted a resolution accompanying its request to be relieved of consideration of the bill for Utah statehood, which reflected the view of the petitions against statehood:

That it is the sense of the Senate that the Territory of Utah ought not to be admitted into the Union as a State until it is certain beyond

⁶⁵ Hickman, *Utah Constitutional Law*, 1954, at 60-61 (unpublished thesis in University of Utah Library).

⁶⁶ Constitution of the State of Utah, art. I, § 17 (1887). Utah's proposed constitution of 1887 is reprinted in H.R. Misc. Doc. No. 104, 50th Cong., 1st Sess. (1888).

⁶⁷ Constitution of the State of Utah, art. II, § 1 (1887). Previous Utah constitutions had extended suffrage to women. Constitution of the State of Utah, art. II, § 1 (1882); Constitution of the State of Deseret, art. II, § 1 (1872).

⁶⁸ Constitution of the State of Utah, art. IV, § 24 (1887). This provision was carried into the constitution of 1896. UTAH CONST. art. VII, § 8.

⁶⁹ Constitution of the State of Utah, art. IX (1887).

⁷⁰ *Id.* art. XV, § 12.

⁷¹ Hickman, *op. cit. supra* note 65, at 63.

⁷² 19 CONG. REC. 433 (1888).

⁷³ *Id.* at 2136.

⁷⁴ *Id.* at 1844.

doubt that the practice of plural marriages, bigamy, or polygamy, has been entirely abandoned by the inhabitants of said Territory and until it is likewise certain that the civil affairs of the Territory are not controlled by the priesthood of the Mormon Church.⁷⁵

The Senate discharged the Committee on the Territories from its obligation to give further consideration to the constitution of 1887 and Utah's petition for statehood died without further action.⁷⁶

The effort to obtain statehood in 1888 brought Utah and the federal government to a critical juncture. It was apparent that complete capitulation on the issue of polygyny was the price for statehood. The federal government's hand was strengthened by two United States Supreme Court decisions in 1890. In *Davis v. Beason*,⁷⁷ the Court upheld an Idaho Territorial Act disenfranchising anyone who taught or advocated polygyny or celestial marriage or who belonged to an organization teaching those principles. And, in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*⁷⁸ the Court upheld confiscation of Church property under the Edmunds-Tucker Act. Federal pressure was increased by the introduction of a bill in Congress, drafted by the Liberal Party of Utah and designed to implement the theory of the Idaho Territorial Act upheld in *Davis v. Beason*, which would have disenfranchised all Mormons in Utah territorial elections.⁷⁹

It became clear "that further resistance to the demands for the abolition of polygamy would destroy the [Mormon] Church, disenfranchise its members and deliver the political affairs of the territory into the hands of the bitterest enemies of the Church."⁸⁰ On September 24, 1890, Church President Woodruff announced that "polygamist" marriages were no longer performed by the Mormon Church and that he intended to submit to the laws banning the practice and influence church members to do likewise.⁸¹

⁷⁵ *Id.* at 2391.

⁷⁶ *Ibid.*

⁷⁷ 133 U.S. 333 (1890).

⁷⁸ 136 U.S. 1 (1890).

⁷⁹ S. 2263, 52d Cong., 1st Sess. (1891).

⁸⁰ Hickman, *op. cit. supra* note 65, at 66-67.

⁸¹ Contrary to popular belief President Woodruff did not expressly attribute his statement to divine revelation, a gift Mormons believe inheres in the office of president of their Church. Nor did the statement disavow the theological belief that polygyny is sanctioned by divine law. The statement was limited to a disavowal of the practice and encouragement of polygamy. The statement is as follows:

Official Declaration

To Whom It May Concern:

Press dispatches having been sent for political purposes, from Salt Lake City, which have been widely published, to the effect that the Utah Commission, in their recent report to the Secretary of the Interior, allege that plural marriages are still being solemnized and that forty or more such marriages have been contracted in Utah since last June or during the past year, also that in public discourses the leaders of the Church have taught, encouraged and urged the continuance of the practice of polygamy—

I, therefore, as President of the Church of Jesus Christ of Latter-day Saints, do hereby, in the most solemn manner, declare these charges are false. We are not teaching polygamy or plural marriage, nor permitting any person to enter into its practice, and I deny that either forty or any other number of plural

The major political parties accepted this declaration as a sincere disavowal of the doctrine of polygyny and supported restoration of the franchise.⁸² The sincerity of the Church's declaration abandoning polygyny was further evidenced by the passage of an act "to punish polygamy and other kindred offenses" by the Thirtieth Session of the Legislative Assembly of the Territory of Utah in 1892.⁸³ The act provided a fine of up to 500 dollars and a jail sentence of up to five years. Unlawful cohabitation, adultery, incest, and fornication were similarly proscribed.

Church renunciation of the practice of polygyny and the subsequent events evidencing the sincerity of that renunciation paved the way for statehood. Several bills for Utah statehood were introduced in the first and second sessions of the Fifty-second Congress, but failed to pass.⁸⁴ The effort to gain statehood continued in the Fifty-third Congress with the introduction of several bills,⁸⁵ one of which, H. R. 352, was destined to become the bill granting statehood to Utah. Debate on H. R. 352 in the second session of the Fifty-third Congress centered upon the issue of the validity of the Mormon renunciation of the practice of polygyny. Utah's delegate, Mr. Rawlins, scored heavily in reply to a vindictive attack by Representative Morse of Massachusetts.⁸⁶ Favorable House reaction to Delegate Rawlins' *ad hominem*

marriages have during that period been solemnized in our Temples or in any other place in the Territory.

One case has been reported, in which the parties allege that the marriage was performed in the Endowment House, in Salt Lake City, in the Spring of 1889, but I have not been able to learn who performed the ceremony; whatever was done in this matter was without my knowledge. In consequence of this alleged occurrence the Endowment House was, by my instructions, taken down without delay.

Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise.

There is nothing in my teachings to the Church or in those of my associates, during the time specified, which can be reasonably construed to inculcate or encourage polygamy; and when any Elder of the Church has used language which appeared to convey any such teaching, he has been promptly reproved. And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.

WILFORD WOODRUFF
President of the Church of Jesus
Christ of Latter-day Saints.

DOCTRINE AND COVENANTS 256-57 (1957).

⁸² Hickman, *op. cit. supra* note 65, at 67.

⁸³ Utah Laws 1892, ch. VII, at 5.

⁸⁴ S. 1653, H.R. 4008, H.R. 9689, 52d Cong., 1st Sess. (1892); S. 3766, H.R. 10190, 52d Cong., 2d Sess. (1893). H.R. 10190 was reported out favorably by the House Committee. H.R. REP. NO. 2337, 52d Cong., 2d Sess. (1893), 24 CONG. REC. 821 (1893).

⁸⁵ S. 164, H.R. 176, H.R. 177, H.R. 352, 53d Cong., 1st Sess. (1893).

⁸⁶ Representatives in Congress were more colorful in style and subject matter and enjoyed more latitude for *ad hominem* attack upon opponents than seems the case today. For example, Delegate Rawlins displayed keen wit and an ability to deflate Representative Morse's impassioned attack upon the immorality of "polygamy," while also avoiding the issue, in his rejoinder to Representative Morse:

Who was responsible for the education of the men who established polygamy in Utah? I tell you, Mr. Chairman, the men who are responsible for its originally were born, were bred, were educated under the system and civilization of New England. . . .

reply to Representative Morse indicated Congress was ready to accept the renunciation of polygyny by Church leaders and admit Utah into the Union. Despite the suspicion of some that polygyny was still being practiced in Utah, H. R. 352 passed both Houses⁸⁷ and was signed by the President on July 16, 1894.⁸⁸

The Enabling Act authorized the calling of a constitutional convention and provided for the election and apportionment of the convention. Section three of the Enabling Act required the convention to include an "ordinance" irrevocable without the consent of the United States in any constitution that might be drafted. The ordinance guaranteed religious freedom, banned polygamy, required a disclaimer of all right and title to unappropriated public lands and Indian lands, banned discriminatory taxes on land owned by nonresidents, required assumption of territorial debts, and required the establishment of public schools open to all children of the state free from sectarian control.⁸⁹

The Enabling Act also provided land grants and a permanent school fund for "common schools," the university, and a state agricultural college. Land grants were also made for public buildings, the establishment of reservoirs for irrigation, an insane asylum, a school of mines, a "deaf and dumb" asylum, a reform school, state normal schools, an institution for the blind, and a hospital for disabled miners. The federal penitentiary and its grounds were also turned over to the state. The remainder of the Enabling Act provided for federal courts, an elective representative to Congress, succession of state courts to territorial courts, an appropriation from the territorial treasury for the constitutional convention, and the submission of any proposed constitution to the voters for ratification.

Delegates to the constitutional convention were duly elected and the convention convened on March 4, 1895. None of the great issues of government was seriously debated.⁹⁰ The convention borrowed heavily from earlier Utah constitutions and other state constitutions, particularly those of Nevada, Washington, Illinois, and New York and retained the antigovernment philosophy which marked Utah's Constitutions of 1872, 1882, and 1887.

I tell the gentleman now that the moral sentiment which led to its adoption in Utah, which led to that feature which is obnoxious, and, in my opinion, ought never to prevail, was the outgrowth of that puritanical sentiment which in some of its excrescences in the older days burnt witches, persecuted Quakers, drove out from the community Roger Williams, and later produced the gentleman from Massachusetts.

26 CONG. REC. 178 (1893).

⁸⁷ 26 CONG. REC. 220, 7251, 7384, 7399, 7446, 7514 (1894).

⁸⁸ *Id.* at 7830. The Enabling Act, ch. 138, 28 Stat. 107 (1894), can be found in 1 UTAH CODE ANN. 61 (1953).

⁸⁹ The ordinance became article III of the Utah constitution. There are serious questions concerning the constitutionality of the ordinance under the federal constitution. In particular, delegation of part of the amending process of a state constitution to the federal government raises the question of whether the state has been admitted into the Union on an equal footing with sister states. See *Coyle v. Smith*, 221 U.S. 559 (1911); *Mannet, Violation by a State of the Conditions of Its Enabling Act*, 10 COLUM. L. REV. 591 (1910).

⁹⁰ The proceedings of the convention were printed in *PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 1895* (1898) (2 vols.).

The constitution was approved by the voters on November 5, 1895, and President Grover Cleveland proclaimed Utah a state on January 4, 1896. The long struggle for statehood had left its mark upon the people and their religious institutions. But perhaps the sorriest victim of the struggle was Utah's constitution, which began as a model state constitution and ended up as a 19th century statute masquerading as a 20th century state constitution.

IV. CONCLUSION AND PROLOGUE

The history of Utah's Constitution of 1896 illustrates a long process of gradually incorporating debilitating constitutional provisions from other states. For example, the constitutionally required election of numerous executive branch officers and the resulting fragmentation of executive power found in article VI, section 1, first appeared in the Deseret Constitution of 1872.⁹¹ With the exception of the elective office of lieutenant governor, article VI, section 1, of the Utah Constitution of 1896 is identical to article VII, section 1 of the Washington Constitution of 1889.⁹² The board of examiners provision,⁹³ which has resulted in the creation of an executive "troika" in Utah,⁹⁴ was copied from the Deseret Constitution of 1872.⁹⁵ The Deseret Constitution of 1872 copied the provision from the Nevada Constitution of 1864.⁹⁶ The special laws limitation upon the legislature⁹⁷ was taken almost verbatim from the Congressional Act of 1886 placing limitations on the territorial legislatures.⁹⁸ The Congressional Act of 1886, in turn, seems to have been based on article III, section 6, of the Pennsylvania Constitution of 1874.⁹⁹ Thus it is impossible to say that the Utah Constitution of 1896 was drafted by Utahns for Utah.¹⁰⁰ It is a patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to

⁹¹ Constitution of the State of Deseret, art. V, §§ 13, 14 (1872).

⁹² The delegates to the Utah Constitutional Convention of 1895 took the position that the office of lieutenant governor served no useful purpose. 1 PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 1895, at 653 (1898).

⁹³ UTAH CONST. art. VII, § 13.

⁹⁴ See, e.g., *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964); *Wood v. Budge*, 13 Utah 2d 359, 374 P.2d 516 (1962); *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958); *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 295 P.2d 348 (1956); Note, *The Utah Board of Examiners*, 5 UTAH L. REV. 349 (1957).

⁹⁵ Constitution of the State of Deseret, art. V, § 18 (1872).

⁹⁶ NEV. CONST. art. V, § 21.

⁹⁷ UTAH CONST. art. VI, § 26.

⁹⁸ Act of July 30, 1886, ch. 818, 24 Stat. 170.

⁹⁹ The revision of Pennsylvania's Constitution of 1839 and the stringent limitations placed upon legislative power by article III of the Pennsylvania Constitution of 1874 were caused by popular reaction to the excesses and corruption which plagued state government in Pennsylvania from the Civil War to the Depression of 1873. For an analysis of article III of the Pennsylvania Constitution of 1874 see Note, *Limitations on the Legislature: Pennsylvania Constitution Article III*, 100 U. PA. L. REV. 1217 (1952).

¹⁰⁰ A reading of the convention debates indicates that none of the great issues of government was seriously debated. For example, no one contested the wisdom of having six elective offices in the executive branch. Most of the debate on the executive article centered upon the compensation to be set by the constitution for each elective office. 2 PROCEEDINGS OF UTAH CONSTITUTIONAL CONVENTION 1895, at 1016-27 (1898).

placate a hostile Congress, and is based upon the late 19th century philosophy that government's main role in society is the negative function of keeping the peace. But the responsibilities of a 20th century state are far different and more complex than those envisioned by the drafters of the constitution of 1896. The responsibility of the drafters of Utah's Constitution of 1896, however, must be weighed in light of Utah's unfortunate constitutional history.

It is the purpose of this Symposium to examine a limited number of the twenty-four articles of Utah's constitution in light of the present responsibilities of state government. Although limited to specific topics, each study in this Symposium should be viewed against the background of Utah's unfortunate constitutional history. Utah began with a model constitution capable of standing the test of time and creating a strong and viable state government and ended up with a hodgepodge of constitutional provisions from other states and a state government crippled by an archaic 19th century statute.

The implications of this state of the state for the principle of federalism are perhaps too obvious to mention. So long as the federal government continues to operate upon a broad and flexible constitution capable of accommodating change and upon a philosophy that government is a positive instrument to assist in accomplishing the ends of society, while state governments operate on a 19th century statute masking as a constitution and a philosophy that government is no more than a necessary evil, the continued trend of the centralization of governmental power in the federal government may be expected. Without doubt, Utah's Constitution of 1896 with its stringent limitations rendering viable state government impossible, must bear part of this responsibility.